1914
Dec. 28.

TORONTO ADMIRALTY DISTRICT.

E. A. SIMPSON,

PLAINTIFF;

v.

THE DREDGE "KRUGER",

"THE SHIP".

Salvage—Mortgagee as salvor—Volunteers.

Held, 1. That the recovery of a sunken dredge, with its contents, constitutes a salvage service creating a maritime lien.

2. That where the mortgagee of the dredge employed others to perform the work of salving and is neither the owner nor charterer of the salving vessels, he cannot claim exemption from the rule that a salvor must be one personally engaged in the work done.

THIS was an action for salvage by the plaintiff against the ship "Kruger", a British vessel, registered in a Canadian port.

The owners did not defend but the plaintiffs, in another action against the same ship for salvage, were allowed to come in and dispute the claim and priority of the plaintiff in this action.

The hearing took place at Osgoode Hall, on December 19, 1914, and judgment was reserved.

G. S. Hodgson for plaintiff.

J. H. Fraser for General Construction Co.

No one for the ship or owners.

1914

SIMPSON v. THE "KRUGER."

Reasons for Judgment.

HODGINS, L.J.A. (December 28, 1914) delivered judgment.

The actual services rendered in this case are, as claimed, salvage services. The dredge "Kruger" was overturned and sunk in the western channel of Toronto Bay, and the boiler and pump were at the foot of Princess Street at the bottom of the bay. The dredge was righted, the boiler and pump recovered and placed on the dredge and the whole left in a situation of safety, ready for the work required to make the whole sufficient. In holding these to be salvage services I follow *The Gleniffer,*[1] and *The Catherine,*[2] the latter regarded as good law by the present Lord Justice Kennedy in his work on *Civil Salvage,* page 111, and by Mr. Jones in his *Law of Salvage,* page 15.

I heard counsel for the General Construction Company which had a judgment for a salvage lien on the ship in opposition to the plaintiff's claim, no one appearing for the owners. Counsel objected that as the plaintiff was mortgagee of the ship he could not claim salvage, citing *Maria Jane,*[3] a decision of Dr. Lushington.

That case turned on the point that Lilley, the owner of the salving ships, was charterer of the salved ship under a special charter, which in the opinion of the Court was practically a demise of the ship. He was also owner of its cargo. Dr. Lushington, under those circumstances, held that Lilley, being practically owner of both the ship and cargo saved could not himself claim salvage against his own property. The case does not carry the law fur-

[1] (1892), 3 Can. Ex. 57.
[2] (1848), 12 Jur. 682.
[3] (1850), 14 Jur. 857.

1914

SIMPSON v. THE "KRUGER."

Reasons for Judgment.

ther than it has always stood, and is only of value in its determination that that special charter was of such a nature as to invest the charterer practically with the character of the owner. The real difficulties in the plaintiff's way are his position as mortgagee, and the fact that the services claimed for were not performed by him.

The *Canada Shipping Act*,[1] provides that "when, "within the limits of Canada, any vessel is wrecked, "abandoned, stranded or in distress and services "are rendered by any person in assisting such vessel "or in saving any wreck, there shall be payable to "the salvor by the owner of such vessel or wreck, as "the case may be, a reasonable amount of salvage "including expenses properly incurred." The owners of the wreck here made no request for the services rendered in this case but do not appear nor contest the plaintiff's claim.

No authority in the plaintiff to bind the owners is shown. Hence, the salvage, if allowed, must depend on what is reasonable.

The word "owners" in a cognate statute, the *Imperial Merchants Shipping Act*,[2] has been held to include mortgagees in so far as it allowed them in to defend a salvage claim as parties interested, *The "Louisa"*.[3] And the mortgage interest may have to contribute as the mortgagees would have an interest in the property saved, *The Cargo ex Schiller*,[4] *Five Steel Barges*,[5] but as pointed out in *The Cargo ex Port Victor*,[6] that result does not invariably follow. Under the *Canada Shipping Act*, sec. 45, a mort-

[1] (1906), R.S.C., ch. 113, sec. 759.
[2] (1854), 17 and 18 Vict., ch. 104, s. 458.
[3] (1863), Br. & L. 59.
[4] (1877), 2 P.D. 145.
[5] (1890), 15 P.D. 142.
[6] [1901] P. 243.

gagee is not to be deemed as an owner except for the purposes of his mortgage. The position of a mortgagee employing a person to do the actual work of salvage and claiming against the ship does not appear to have been considered so far as I have been able to ascertain.

In the case of *The "Pickwick"*[1] and *Crouan* v. *Stanier*,[2] the status of underwriters (stated, arguendo, in the *Port Victor* case, *supra*, to be somewhat similar to that of mortgagees) was considered. In the *"Pickwick"* the claimants as insurers were awarded nothing but were allowed by the Court to recover the salvage to which the master and crew of the vessel, hired by them to do the service, would have been entitled and as asserting the latter's rights. But as pointed out in *Crouan* v. *Stanier*, *supra*, that was based upon the theory that the master and crew, if they recovered for the salvage actually performed, would have been bound under the terms of their charter party to hand over the amount thereof to the insurers.

In the case at bar two tugs were employed by Arnott (as appeared in the General Construction case) and if he were suing for salvage the same decree as was made in the *"Pickwick"* would be justified, provided the terms of hiring were such as obtained in that case. But the plaintiff here remained on shore and contracted with Arnott that he would do the work in consequence of which the latter then hired two tugs. There is, it seems to me, no justification for the extension to the plaintiff of the principle adverted to. His rights do not extend beyond Arnott under whose contract the latter was entitled

[1] (1852), 16 Jur. 669.
[2] [1904] 1 K.B. 87.

1914

SIMPSON v. THE "KRUGER."

Reasons for Judgment.

to do what he liked, provided he accomplished his undertaking and his obligation does not in any sense entitle the plaintiff to a maritime lien.

The plaintiff is not the owner of the salving vessels nor is he their charterer. The means of doing the work was left entirely to Arnott. The plaintiff, therefore, cannot claim to be within the exception to the rule that salvors must be those personally engaged in the work done.

I have not overlooked the fact that Arnott has assigned his claim to the plaintiff. But this was after the plaintiff had paid the contract price and discharged his obligation and therefore the assignment conveyed nothing and certainly could not convey the right to enforce a maritime lien, arising only on the principle already discussed.

But apart from the foregoing, the plaintiff being interested as mortgagee in the safety of the property was, therefore, not a volunteer (*Crouan* v. *Stanier, supra*), a character necessary to the maintenance of a claim for maritime salvage (*Kennedy on Civil Salvage* 63). I regret this result. But if the plaintiff has a mortgage which, according to the evidence is nearly equal to, if not now greater in amount than the present value of the dredge, any allowance to him against the owner's interest would be practically valueless.

The action will be dismissed, but without costs. The General Construction Company, who appeared, should get no costs as their claim would not, in my view, have been interfered with if the plaintiff had been held entitled to salvage. This judgment, based upon the maritime law of salvage, will not preclude

1914

SIMPSON v. THE "KRUGER."

Reasons for Judgment.

the plaintiff, as mortgagee, from making a claim hereafter, to add his payment to Arnott to his mortgagee debt, if he is so advised. If made it must be dealt with as an application to settle priorities, if the amount realized by sale warrants such a motion.

Action dismissed.